IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

INCOME TAX REFERENCE No. 149 of 1995
with
INCOME TAX REFERENCE Nos. 157, 160, 161, 162, 163, 164 and 148 of 1995

For Approval and Signature:

HONOURABLE MR.JUSTICE R.S.GARG
HONOURABLE MR.JUSTICE M.R. SHAH

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1 Whether Reporters of Local Papers may be allowed to see the judgment ?

2 To be referred to the Reporter or not ?

3 Whether their Lordships wish to see the fair copy of the judgment ?

4 Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?

5 Whether it is to be circulated to the civil judge ?

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SANJIV FAMILY TRUST - Applicant(s)
Versus
COMMISSIONER OF INCOME TAX - Respondent(s)

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Appearance :
MR SN SOPARKAR for Applicant(s) : 1,
MR MANISH R BHATT for Respondent(s) : 1,

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CORAM : HONOURABLE MR.JUSTICE R.S.GARG

and

HONOURABLE MR.JUSTICE M.R. SHAH

Date : 13/07/2006

COMMON ORAL JUDGMENT

(Per : HONOURABLE MR.JUSTICE R.S.GARG)

1. At the very beginning of the hearing, Mr. S.N. Soparkar, learned Senior Advocate submitted that the matters relate to first level Trust and second level Trust, ITR No. 149 of 1995 – Sanjiv Family Trust is the first level Trust while ITRs. No. 157/95, 160/95, 161/95, 162/95 and 163/95 are References at the instance of the second level Trusts who are claiming certain benefit under the first level Trust. His further submission is that yet another first level Trust, namely, Hemesh Family Trust (ITR No. 148 of 1995) is not before this Court, so also Chanchalba Family Trust (ITR 164 of 1995), which is second level Trust is also not on the board and as these two matters are raising common question, matters may be called and be disposed of along with the listed matters. Mr. M.R. Bhatt, learned counsel for the Revenue has no objection. We have accordingly called ITR No. 148/95 and 164/95.

2. Mr. Soparkar, learned Senior Advocate for the petitioner, after taking us through the Trust Deed and provisions of Section 164 of Indian Income Tax Act, submitted that the Assessing Officer, Commissioner (Appeals) and the Tribunal were in fact, impressed by the observations made by the Supreme Court in the matter of **McDowell & Co. Ltd. v. C.T.O., reported in 154 ITR 148** and did not refer to the provisions of law, specially Section 164 Explanation 1[ii]. His further submission is that the original Trust namely, Sanjiv Family Trust, Ahmedabad, had four beneficiaries and as each of them had a determinate/fixed share, beneficiaries were to receive 25% of the income and were also to receive 25% of the corpus on determination of the Trust, any act on their part in selling or assigning their right would not make any change into the original Trust, a specific Trust would not become discretionary Trust. His submission is that tax cannot be charged on the relevant income or part of relevant income at the maximum marginal rate.

Referring to the judgment in the matter of **Union of India v. Azadi Bachao Andolan reported in 263 ITR 706,** it is submitted by him that the observations made by Their Lordships of the Apex Court in the matter of McDowell Co.Ltd. [supra] have been diluted to a large extent and the tax planning which was taken by the Apex Court to be bad in the matter of McDowell Co. Ltd. is being accepted as a proper policy. His further submission is that the questions have not been appreciated in their proper perspective and the authorities went on a wrong line and instead of deciding the legal issue, went on moral aspect of the matter. It is submitted that on a perusal and fair understanding of Section 164 Explanation 1[ii], it would clearly appear that tax at maximum marginal rate could not be levied. Shri M.R. Bhatt, learned counsel for the Revenue, however, submitted that the thrust of the matter in Section 164 is on the words “specifically receivable” and in the present matter, by assignment or alienation of the right, title and

interest, beneficiary in the first level Trust has asked the Trustees to join more people to the first level Trust and as such, determination of the shares has become different. His further submission is that second level Trust is some Body of Individuals, [commonly known as BOIs] and as the benefit ultimately would percolate to the individuals, the authorities were justified in deciding against the interest of the assessee.

3. We have gone through the orders passed by the authorities and have also gone through the order passed by the Tribunal. From the order passed by the Tribunal, it would clearly appear that instead of making any reference to Section 164 of the Income Tax Act, it has referred to the assignment and after reading of the deeds and documents in juxtaposition, made observation that the act on the part of the assessee and his intention was to deprive the Revenue of its lawful recovery. It would also appear that the Tribunal has referred to the observations made by the Supreme Court in the matter of McDowell

Co. Ltd. and has further observed that the intention of the settlers, trustees and beneficiaries can always be looked into. It observed that the matter at hand was worse from the assessee's angle even if piercing of veil for Trust was not made applicable. It also observed that the assessee Trust on the facts and juxtapose reading of the deeds and documents being one of the nine Trusts is discretionary Trust in respect of the income, which stands assigned to the second level Trust.

4. Agreeing with the submission made by the assessee, the Tribunal observed that once maximum marginal rate of tax was applied, second line of beneficiaries could not be taxed.

5. The question that provisions of Section 164 Explanation 1[ii] would apply to the present case or not had at all not been considered by the Tribunal.

Section 164 Explanation 1[ii] says that

Explanation: for the purposes of this section,--

[i] xx xx xx

[ii] the individual shares of the persons on whose behalf or for whose benefit such income or such part thereof is received shall be deemed to be indeterminate or unknown unless the individual shares of the persons on whose behalf or for whose benefit such income or such part thereof is receivable, are expressly stated in the order of the court or the instrument of trust or wakf deed, as the case may be, and are ascertainable as such on the date of such order, instrument or deed."

The question for determination before the Tribunal was whether individual shares of the persons on whose behalf or for whose benefit such income or such part thereof is receivable was expressly stated in the deed or not. The Tribunal did not advert its attention to the fact that the entire dispute was hinging upon the interpretation of the Trust Deed in light of Explanation-1.

6. Taking into consideration the totality of the

circumstances, we are of the view that the order passed by the Tribunal cannot be upheld as without proper interpretation and application of law, it has decided the matter against the interest of the assessee.

7. At this stage, Mr. Bhatt, learned counsel for the Revenue submits that the entire order made by the Tribunal, including the benefit in relation to the double taxation be set aside so that proper tax is recovered either from the first level Trust beneficiary or from the second level Trust beneficiary or from the Body of Individuals or from the individuals. Taking into consideration the fact that the order in relation to recovery of maximum marginal rate of interest is being set aside on the ground of beneficiary share, we are of the opinion that that part of the order may also be set aside. The Tribunal would be entitled to reconsider the entire matter and redetermine the liability of the assessee, that is, the beneficiary of the first level Trust. It would be open to the Tribunal to reconsider the matter and decide the

matter in accordance with law after taking into consideration the judgments above-referred and 209 ITR 101 and 231 ITR 540 on which reliance is being placed by the learned counsel for the Revenue. As we are remanding the matters back to the Tribunal, we refuse to make any observation on the merits of the matters as the same is likely to adversely affect the right of either party.

[R.S. GARG, J.]

[M.R. SHAH, J.]

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